

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Energie Group LLC

Project No. 12684-001

ORDER DENYING REHEARING

(Issued September 6, 2006)

1. In this order, we deny the request for reinstatement of license application or, in the alternative, request for rehearing, filed by Energie Group LLC and Elaine Hitchcock (Energie) of the Commission's June 19, 2006, Order rejecting Energie's application for a license to construct and operate the Williams Dam Project No. 12684.¹

Background

2. On April 8, 2003, Energie filed an application for a preliminary permit to study the feasibility of constructing and operating the Williams Dam Project No. 12454, to be located at the existing Williams Dam on the East Fork of the White River in Lawrence County, Indiana (the preliminary permit proceeding). Public notice of Energie's permit application was issued on August 7, 2003.²

3. On November 26, 2003, Energie filed a license application for the project. On December 10, 2003, the Commission issued public notice that Energie's license application had been tendered for filing, solicited additional study requests, and established a deadline for filing of final amendments.³ The December 10, 2003, notice did not accept Energie's license application.

¹ Letter to Stacy Harriot, Energie, from Ann F. Miles, Director, Division of Hydropower Licensing, June 19, 2006.

² 68 F.R. 49469 (Aug. 18, 2003).

³ 68 F.R. 70240 (Dec. 17, 2003).

4. On February 6, 2004, the Commission rejected Energie's license application as patently deficient, and informed Energie that if it wished to pursue the project, the application would have to be revised and resubmitted.⁴

5. On December 21, 2004, the Commission denied Energie's preliminary permit application because Energie is under the control and direction of Elaine Hitchcock, and Ms. Hitchcock's history of non-compliance at other Commission-authorized projects makes her, or any entity under her control or direction, unfit to hold a license, making issuance of a preliminary permit inappropriate.⁵

6. On June 7, 2006, Energie resubmitted a revised license application. Since the first license application had been rejected and the preliminary permit application denied, the resubmitted license application was assigned Project No. 12684.

7. On June 19, 2006, the Commission rejected Energie's resubmitted license application, citing its prior conclusion that Ms. Hitchcock and any entity under her control and direction are unfit to hold a license.⁶ In response, Energie and Ms. Hitchcock⁷ timely filed a "request for reinstatement of license [application] or, in the alternative, request for rehearing."⁸

⁴ Letter to Ms. Stacy Harriot, Energie, from J. Mark Robinson, Director, Office of Energy Projects.

⁵ *Energie Group LLC*, 109 FERC ¶ 62,225, *reh'g denied*, 111 FERC ¶ 61,072 (2005), *appeal filed*, *Energie Group, LLC, et al. v. FERC*, D. C. Cir. No. 05-1206 (June 15, 2005) (*Energie* permit proceeding).

⁶ *See* n.1 above.

⁷ Only a party to a proceeding may seek rehearing. FPA section 313(a), 16 U.S.C. § 825l(a) (2000). Ms. Hitchcock is not a party to the proceeding because the license application was filed by Energie alone. In view of her position as a principal of Energie, we construe Ms. Hitchcock's participation in the rehearing request as a motion to intervene, which we will grant.

⁸ In apparent support of Energie's and her rehearing request, Ms. Hitchcock filed on July 27, 2006, part of a 1992 magazine article regarding her efforts to rehabilitate existing hydroelectric projects. On August 16, 2006, she filed a one-page letter describing the origins of Energie, suggesting that other entities are responsible for her difficulties, and asserting that her efforts to develop small hydroelectric projects are necessary for national security. Although the Commission cannot entertain a request for
(continued...)

Discussion

A. Procedural Matters

8. As noted, Energie requests rehearing as an alternative to reinstatement of its license application. The Division Director's letter rejecting Energie's resubmitted license application was issued under authority delegated from the Commission.⁹ It is therefore a Commission order for purposes of rehearing pursuant to Federal Power Act (FPA) section 313(a).¹⁰ Thus, reinstatement of the license application could only occur as a result of our granting Energie's rehearing request. As discussed below, we decline to do so.

B. Energie's Arguments

9. Energie first argues that the Commission waived issues regarding fitness in this license application proceeding by issuing the December 10, 2003, public notice without mentioning the issue. It asserts that fitness was not raised by the Commission until December 2004, in the context of Energie's preliminary permit application.¹¹

10. The December 10, 2003, notice is irrelevant to the matter of fitness. It is a standard form notice that does no more than inform the public that a license application has been tendered and requests additional study requests from agencies and tribes with

rehearing that is filed after the 30-day statutory deadline of FPA section 313(a), 16 U.S.C. § 8251 (2000), it may, in compelling circumstances and for good cause shown, grant a request to supplement a timely rehearing request. *Hydro Development Group, Inc.*, 103 FERC ¶ 61,071 at P 13 (2003). No compelling circumstances exist in this instance. The filings contain no new information or otherwise assist our consideration of the issues on rehearing. They will therefore be rejected.

⁹ The Office Director or his designee is delegated authority to act on uncontested license applications. 18 C.F.R. § 375.308(a)(1) (2006).

¹⁰ 16 U.S.C. § 8251(a) (2000). A delegated order is subject to rehearing if the same order, if issued by the Commission, would be subject to rehearing. The Division Director's letter, since it disposes of Energie's license application, is subject to rehearing.

¹¹ Rehearing request at 6.

jurisdiction or special expertise. It is issued prior to consideration of any substantive issues; indeed, one purpose of the notice is to assist the Commission in defining the issues.¹²

11. Energie next alleges that there is no evidence to show either Energie or Ms. Hitchcock is unfit to hold a license, and that we should have requested additional information on fitness before rejecting the resubmitted license application.¹³ This is a collateral attack on the Commission's findings regarding fitness in the preliminary permit proceeding, which are now administratively final and under the court's jurisdiction. However, Energie provides no evidence or argument that causes us to question our prior conclusions on this matter.¹⁴

12. Energie submits that rejection of its license application is an unlawful retroactive penalty, which punishes Ms. Hitchcock again for her previous violations, and suggests that we have violated our regulations implementing FPA section 31's¹⁵ provisions pertaining to assessment of civil penalties, which require the Commission to give a licensee or permittee notice of a proposed penalty.¹⁶

13. To the extent that Energie is suggesting that Ms. Hitchcock is entitled to a notice of proposed penalty in this proceeding, it made essentially the same argument in the preliminary permit proceeding, where we explained that our civil penalty authority pertains only to the enforcement of licenses, exemptions, and permits that have already been issued, not to the denial of an application in an ordinary notice and comment proceeding.¹⁷ The circumstances here are identical in every material respect.

14. The argument also fails to the extent that Energie is complaining that Ms. Hitchcock was not given notice in prior compliance proceedings which resulted in

¹² Similarly, a notice accepting a license application for filing is irrelevant to the issue of fitness, as acceptance rests only on a finding that the applicant has submitted sufficient information to satisfy the Commission's filing requirements.

¹³ Rehearing request at 6-10.

¹⁴ See *Energie Group, LLC*, 111 FERC ¶ 61,072 at P 10-13 (2005).

¹⁵ 16 U.S.C. § 823b (2000).

¹⁶ The implementing regulations are at 18 C.F.R. §§ 385.1501-11 (2006).

¹⁷ See *Energie Group LLC*, 111 FERC ¶ 61,072 at P 14 (2005).

findings of violation that she could later be found unfit to hold a license.¹⁸ The compliance proceedings on which the Commission relied to find Ms. Hitchcock unfit are administratively and judicially final.

15. Energie also asserts that we violated Commission policy by rejecting its license application without first issuing an order to show cause why it should not be found unfit.¹⁹ Energie relies in this regard on *Cook Industries*,²⁰ in which the Commission issued such a show cause order to a license applicant under the control and direction of an individual with a poor compliance record at two other Commission-regulated hydropower projects under his control.

16. The Commission's decision on how to proceed in one fact-bound case does not establish a policy. In this case, consistent with prior orders, we determined that the extensive history of non-compliance at projects under Ms. Hitchcock's control and direction warrants a finding of lack of fitness. A show cause proceeding would therefore serve no purpose.

17. Energie also claims that the Commission has a policy of not denying license applications based on lack of fitness. To demonstrate the existence of this alleged policy, Energie cites *City of Augusta, et al.*,²¹ where the Commission found that an applicant should not be denied a license because it had been assessed a civil penalty for failing to timely file a fisheries mitigation plan at a separate licensed project and had relocated a short portion of the transmission line for that other project without authorization.

18. Energie errs on both counts. First, *Augusta* specifically states that fitness is a relevant factor in licensing decisions, and could lead to denial of a license application. That the Commission did not deny the license application based on the facts of that proceeding hardly establishes a policy. And, indeed, the facts there are quite different from those in this proceeding. In *Augusta*, the applicant admitted its violation of the fisheries plan requirement and paid the civil penalty,²² and the Commission found that no

¹⁸ *Id.* at 11.

¹⁹ Rehearing request at 12.

²⁰ 72 FERC ¶61,115 (1995) (approving settlement agreement); *see also Turbine Industries, Inc.*, 68 FERC ¶ 61,127 (1994) (issuing order to show cause).

²¹ 72 FERC ¶ 61,114 (1995).

²² *See City of Hamilton, Ohio*, 62 FERC ¶ 61,106 (1993).

environmental impacts resulted from relocation of the transmission line segment.²³ Here, projects under the control and direction of Ms. Hitchcock have been assessed multiple civil penalties, including violations of environmental requirements, and some of which the Commission concluded were quite serious.²⁴

19. Energie claims that Ms. Hitchcock is being “targeted” because no other entity has been denied a license on fitness grounds.²⁵ First, Energie’s assertion that no other entity has been found unfit to receive any additional licenses or exemptions is incorrect.²⁶ In any event, Energie raised a similar claim in the preliminary permit proceeding, where we explained that our lack of fitness finding is based only on Ms. Hitchcock’s poor compliance record.²⁷

20. Energie next asserts that we have departed from a policy of resolving issues based on the legal identity of an applicant rather than imputing the actions of an entity to the controlling person or persons.²⁸ Energie misreads our precedent. We do not separate the identities of partners from partnerships where matters of fitness to receive a license are

²³ See *City of Hamilton, Ohio*, 83 FERC ¶ 61,244 (1998).

²⁴ See *Energie Group LLC*, 111 FERC ¶ 61,072 at P 10-13 and orders cited therein (2005).

²⁵ Rehearing request at 13.

²⁶ See *Appalachian Rivers Resource Enhancement, LLC*, 114 FERC ¶ 61,145 (2006) (denying preliminary permit applications by corporations based on poor compliance history of controlling shareholder as president of licensee for another project).

²⁷ *Energie Group LLC*, 111 FERC ¶ 61,072 at P 16.

²⁸ Request for rehearing at 13-14. Energie cites in this regard *Larry Pane*, 24 FERC ¶ 61,236 (1983) (individual partner not permitted to take advantage of partnership’s preliminary permit priority) and *Tropicana Limited Partnership*, 65 FERC ¶ 61,094 (1993) (partnership affiliated with corporate preliminary permit applicant bound by deadline for filing development application in competition with its affiliate’s preliminary permit application).

concerned. In fact, we have consistently examined the conduct of persons controlling and directing licensees and exemptees in this context, including the prior cases involving Ms. Hitchcock.²⁹

21. Finally, Energie claims that rejection of its license application is punitive in nature, and therefore requires a hearing under regulations implementing FPA section 31 or the Administrative Procedure Act (APA).³⁰ As explained above, section 31 does not apply to this situation.³¹

22. APA section 554,³² pertaining to adjudications required by statute to be determined on the record after opportunity for an agency hearing, requires the agency, as relevant here, to give the parties adequate notice, the opportunity to submit facts and arguments, and a hearing and decision on the record. We fulfilled all these requirements with respect to Ms. Hitchcock's fitness to hold a license in the preliminary permit proceeding. In fact, the APA does not require a trial-type hearing in all cases. This proceeding, in which Energie was given notice of our actions and availed itself of the opportunity to present factual and legal arguments on rehearing, constitutes an

²⁹ See, e.g., *Turbine Industries, Inc.*, 68 FERC ¶ 61,127 (1994) (ordering corporate applicant to show cause why its license application should not be denied on fitness grounds because of the poor compliance record of two other corporate exemptees for other projects under the management of the same individual); *Carl E. Hitchcock, Elaine Hitchcock, and Energie Development Company, Inc. and Carl E. Hitchcock*, 69 FERC ¶ 61,382 (1994) (denying license application based on the compliance record of Ms. Hitchcock with respect to other projects under her control and direction); *Energie* preliminary permit proceeding; and *Appalachian Rivers Resource Enhancement, LLC*, 114 FERC ¶ 61,145 (2006) (denying preliminary permit applications by corporations based on poor compliance history of controlling shareholder as president of licensee for another project).

³⁰ 5 U.S.C. § 551, *et seq.* (2000). Energie cites "5 U.S.C. § 701(10)(A), (G)." There is no such section. 5 U.S.C. § 701 (2000) is the definitions section of APA Chapter 7, pertaining to judicial review.

³¹ See P 12-13 above.

³² 5 U.S.C. § 554 (2000).

appropriate hearing for APA purposes.³³ Moreover, the APA does not require us to afford Energie or Ms. Hitchcock an opportunity in this proceeding to collaterally attack the findings in the other proceeding.

23. In conclusion, Energie has provided no facts or arguments which would cause us to grant rehearing.

The Commission orders:

(A) Elaine Hitchcock's motion to intervene in this proceeding is granted.

(B) Elaine Hitchcock's submissions filed in this proceeding on July 27 and August 16, 2006, are rejected.

(C) The request for rehearing filed by Energie Group LLC and Elaine Hitchcock on July 18, 2006, in this proceeding is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³³ See *Sierra Association for the Environment v. FERC*, 744 F.3d 661, 663-64 (9th Cir. 1994).